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### TCPA: It is Time to Provide Clarity

**by: Michael O'Rielly, FCC Commissioner**

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For those that might not be familiar, the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227) was enacted in 1991 to address the issue of unwanted telephone marketing calls and faxes. It restricts making telemarketing calls, using automatic telephone dialing systems and artificial or prerecorded voice messages (often referred to as robocalls), and sending unsolicited faxes. From most accounts, it appears to have been a general success.

In enacting the TCPA, the Congress aimed to strike a balance between protecting consumers from unwanted communications and enabling legitimate businesses to reach out to consumers that wish to be contacted. Over time, as the FCC and the courts have interpreted the TCPA, business models and ways of communicating with consumers have also changed. As a result, the rules have become complex and unclear. In addition to prohibiting abusive robocalls and junk faxes, which was the original intent, the rules are creating situations where consumers might not receive notifications and offers that they want and expect, and where new and innovative services and applications that help friends and family members communicate with each other could be restricted. Clear rules of the road would benefit everyone.

Indeed, the problems caused by this lack of clarity are evidenced by an increasing number of TCPA-related law suits and a growing backlog of petitions pending at the FCC. According to data cited by the U.S. Chamber of Commerce in its recent comments, TCPA lawsuits have increased 30 percent over the last year. Meanwhile, there are several dozen petitions asking the FCC to declare or clarify that a particular service or method of communicating would comply with the TCPA. It is very troubling that legitimate companies feel they have to ask the government for its blessing every time they need to make a business decision in order to avoid litigation.

That is why the FCC needs to address this inventory of petitions as soon as possible. Through this process, the FCC has the opportunity to answer important questions and provide much needed guidance on a variety of TCPA issues, including what it means to initiate a call, whether there is liability for calls made to reassigned phone numbers, whether consent can be obtained through intermediaries, whether consent can be inferred from consumer behavior or social norms, whether devices including smartphones could be considered automatic telephone dialing systems, and what types of faxes are actually unsolicited. Tackling this backlog in a comprehensive manner will help restore certainty and reduce the need to file additional petitions.

The FCC also needs to take a hard look at its own precedent. Some of these prior interpretations of the TCPA, while well-meaning, may have contributed to the complexity by enlarging the scope of potential violations. For example, the FCC expanded certain TCPA requirements to encompass *solicited* fax advertisements even though the statute is limited to *unsolicited* fax advertisements. Specifically, the TCPA makes it unlawful "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" unless certain conditions are met. And, even if those conditions are met, the TCPA specifies that the "unsolicited advertisement" must "contain[] a notice" so that consumers are able to opt-out of receiving future faxes. The FCC's rules, however, require the notice to be provided on all fax advertisements, whether solicited or unsolicited.

The TCPA is supposed to protect consumers from unwanted commercial robocalls, texts, or faxes. The FCC must hold bad actors accountable when they violate this law. But the FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services.

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